

NON-STATE ACTORS AS RESPONDENTS BEFORE INTERNATIONAL JUDICIAL BODIES

*Peter Tzeng**

I.	INTRODUCTION	398
II.	THE NON-STATE ACTOR’S OBLIGATION	401
	A. <i>Theory</i>	401
	B. <i>Lex Specialis</i>	404
	1. International Humanitarian Law	405
	2. International Human Rights Law	406
	3. International Investment Law	409
	C. <i>Lex Generalis</i>	410
III.	JURISDICTION OVER THE NON-STATE ACTOR	411
	A. <i>Theory</i>	411
	B. <i>Lex Specialis</i>	412
	1. International Investment Law	412
	2. Law of the Sea	414
	3. International Criminal Law	414
	C. <i>Lex Generalis</i>	415
IV.	CONCLUSION	416

Abstract

For centuries, non-state actors have acted as claimants before international judicial bodies. Only recently, however, have they begun acting as respondents. This Article considers how five areas of international law—international investment law, international human rights law, international humanitarian law, international criminal law, and the law of the sea—deal with non-state actors in order to identify a *lex generalis* governing non-state actors as respondents. In particular, this Article examines two elements that must be established to make a successful claim against a non-state actor: (1) how non-state actors acquire obligations under international law; and (2) how international judicial bodies acquire jurisdiction *ratione personae* over non-state actors.

* Associate, Foley Hoag LLP; Diploma, The Hague Academy of International Law; J.D., Yale Law School; A.B., Princeton University. Email: ptzeng90@gmail.com. The views expressed in this Article are solely those of the author, and do not necessarily reflect the views of any institution with which the author is affiliated.

I. INTRODUCTION

For centuries, non-state actors have acted as claimants before international judicial bodies. The Jay Treaty of 1794—widely considered to be the foundation of modern arbitration¹—permitted non-state actors to file claims against states.² Since then, many international claims commissions,³ international investment agreements,⁴ and international human rights treaties⁵ have similarly permitted non-state actors to file claims against states. In fact, the majority of claims heard by the first international court with jurisdiction over states, the first Central American Court of Justice, were filed by individuals.⁶ The phenomenon of non-state actors acting as claimants before international judicial bodies is thus well established in international law.

The phenomenon of non-state actors acting as respondents, however, is relatively new. In 1945, the International Military Tribunal in Nuremberg was established to adjudicate claims under international law against individuals.⁷ Beginning in the 1990s, various international criminal courts and tribunals were similarly established to prosecute individuals for international crimes.⁸ It thus appeared that the phenomenon of non-state actors acting as respondents was confined to the sphere of international criminal law. This conception, however, is inaccurate. Some international

1. See Charles H. Brower II, *Arbitration*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 13 (2007).

2. Treaty of Amity, Commerce, and Navigation, Gr. Brit.-U.S., arts. 6, 7, Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty]. Article VI of the Jay Treaty also permitted non-state actors to file claims against other non-state actors, but the basis for these claims was contracts, not international law. See *id.* art. 6. 1 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 271–76 (1898).

3. See, e.g., Convention on the Settlement of Matters Arising Out of the War and the Occupation ch. 5, art. 7, May 26, 1952, 6 U.S.T. 4411, 332 U.N.T.S. 219.

4. See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. 7, Nov. 14, 1991, 31 I.L.M. 124.

5. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 4, 1950, 213 U.N.T.S. 221; Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

6. Rosa Riquelme Cortado, *Central American Court of Justice (1907–18)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 16 (2013).

7. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal arts. 1, 5, Aug. 8, 1945, 82 U.N.T.S. 280.

8. See, e.g., S.C. Res. 827, ¶ 2 (May 25, 1993) (establishing the International Criminal Tribunal for the former Yugoslavia); S.C. Res. 955, ¶ 1 (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda).

investment agreements (IIAs) grant arbitral tribunals broad jurisdiction over disputes between investors and states,⁹ such that states have filed counterclaims against investors, leading the investors to act as respondents. Also, the United Nations Convention on the Law of the Sea (UNCLOS) grants the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) jurisdiction over “disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises *and natural or juridical persons*,”¹⁰ suggesting that a non-state contractor could act as a respondent in such a dispute settlement proceeding.

Admittedly, it is not common for non-state actors to act as respondents before international judicial bodies. Nevertheless, as non-state actors are playing an increasingly important role in international law, this phenomenon is likely to become more common. This Article thus examines the particular issues that arise when non-state actors act as respondents before international judicial bodies.

As a preliminary matter, a few terms must be defined. First, as used in this Article, a “non-state actor” is any actor that is not only not a state, but also not an international organization. Non-state actors may thus be, *inter alia*, individuals, corporations, terrorist groups, and sub-state entities. Second, the term “claim” in this Article refers to claims or counterclaims only under public international law, not under domestic law or private international law. As a result, contractual claims in international commercial arbitration are excluded from the scope of this Article. Third, a “claimant” is any actor that makes a claim or counterclaim against another actor before an international judicial body. In some forums, the “claimant” is more commonly called an “applicant” or a “petitioner,” but for uniformity, this Article exclusively uses the term “claimant.” Fourth, a “respondent” is the actor against whom the claim or counterclaim is made. In the context of international criminal law, the respondent is often called an “accused” or a “defendant,” but again for uniformity, this Article exclusively uses the term “respondent.” Fifth, an “international judicial body” is any public international body that renders decisions on the responsibility of the respondent on the basis of public international law. The term thus includes, *inter alia*, the International Court of Justice (ICJ), investor-state arbitral tribunals, panels of the World Trade Organization, international criminal tribunals, claims commissions, and human rights treaty bodies.

9. See, e.g., Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, Arg.-Spain, art. X(1), Oct. 3, 1991, 1699 U.N.T.S. 202 [hereinafter Argentina-Spain BIT].

10. U.N. Convention on the Law of the Sea art. 187(c), Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS] (emphasis added).

Over the past decade, the literature on non-state actors has exploded. Leading commentators have written hundreds of books and articles on the implications of non-state actors acting as subjects of international law.¹¹ Nevertheless, the existing literature does not provide a sufficient understanding of non-state actors acting as respondents before international judicial bodies. This is for two principal reasons. The first reason is that most commentary on non-state actors focuses on their rights rather than their obligations. This can perhaps be explained by the fact that non-state actors seem to have more rights than obligations under international law. Further, as noted above, there is a long history of non-state actors acting as claimants before international judicial bodies, whereas the phenomenon of non-state actors acting as respondents is rather new. All this said, today there is undoubtedly a growing literature on the obligations of non-state actors under international law. This is where the second reason comes into play: commentary on the obligations of non-state actors tend to focus on one particular area of law, one particular type of obligation, and/or one particular type of non-state actor. For example, many commentators have focused on the obligations of non-state armed groups under international humanitarian law.¹² Another popular topic is the obligations of corporations under international human rights law.¹³ Rather than focus on any particular area of law, obligation, or type of non-state actor, this Article aims to identify a *lex generalis* concerning non-state actors acting as respondents before international judicial bodies.

As a general matter, a claimant must establish five elements to make a successful claim under international law against a respondent before an international judicial body. First, the respondent must hold an obligation under international law (“an international obligation”). Second, the respondent must have breached that obligation. Third, the respondent must have responsibility under international law (“international responsibility”) for that breach. Fourth,

11. See, e.g., Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT’L REV. RED CROSS 491, 498 (2006) [hereinafter Clapham, *Human Rights Obligations*]; ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW (Jonathan Huston trans., 2016); KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW 3 (2011); Jean d’Aspremont et al., *Sharing Responsibility Between Non-State Actors and States in International Law: Introduction*, 62 NETH. INT’L L. REV. 49, 49–67 (2015).

12. See, e.g., Antonio Cassese, *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 INT’L & COMP. L. Q. 416, 416–39 (1981).

13. See, e.g., Sufyan Droubi, *Transactional Corporations and International Human Rights Law*, 6 NOTRE DAME J. INT’L & COMP. L. 119 (2016); Emeka Duruigbo, *Corporate Accountability and Liability for International and Human Right Abuses: Recent Changes and Recurring Challenges*, 6 NW. J. INT’L HUM. RTS. 222 (2008).

the claimant must have the right to invoke that responsibility. And fifth, the judicial body must have jurisdiction over the matter.

This Article aims to address only the particular issues that arise when the respondent is a non-state actor. Notably, the second and fourth elements are inquiries for which, more often than not, particular issues do not arise when the respondent is a non-state actor as opposed to a state. Particular issues could arise with respect to the third element, but this Article also does not address this element because of spatial constraints. As a result, this Article examines only the first and fifth elements.

The Article is organized as follows: Section II will discuss the non-state actor's obligation, focusing on how non-state actors acquire obligations under international law; Section III will discuss the judicial body's jurisdiction, focusing on how the judicial body acquires jurisdiction *ratione personae* over non-state actors; Section IV will then conclude the Article.

II. THE NON-STATE ACTOR'S OBLIGATION

A successful claimant must first establish that the non-state actor holds an obligation under international law. Commentators today generally agree that non-state actors can hold obligations under international law. The more difficult question, however, is how non-state actors acquire such obligations.

A. Theory

States acquire international obligations by operation of any of the sources of international law: treaties, custom, and general principles of law. To this list may be added unilateral acts. An underlying theme that pervades most if not all these sources is consent: a state holds only obligations to which it has expressly or impliedly consented. For treaties, the *pacta tertiis* rule provides that a state cannot be bound by a treaty to which it did not consent.¹⁴ And for custom, the persistent objector rules similarly provides that a state cannot be bound by a custom to which it objected during its formation.¹⁵ Although some scholars assert that non-state actors are not subject to this "voluntarist paradigm,"¹⁶ this Article proceeds on the assumption that they are subject to the paradigm. The

14. Vienna Convention on the Law of Treaties art. 34, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT].

15. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116, at 126 (Dec. 18); Asylum (Colom. v. Peru), Judgment, 1950 I.C.J. Rep. 266, at 277-78 (Nov. 20).

16. See, e.g., Marko Milanović, *Is the Rome Statute Binding on Individuals? (and Why We Should Care)*, 9 J. INT'L CRIM. JUST. 25, 39 (2011).

reason is that, if international law has now developed to the point where non-state actors may act as respondents before international judicial bodies and may be held responsible for breaches of international law, then they should be treated the same way that states are treated in the context of dispute settlement proceedings. In light of this understanding, in order to determine how non-state actors may acquire obligations under international law, one must examine the three traditional sources of international law (treaties, custom, and general principles of law), as well as unilateral acts.

First, can non-state actors acquire obligations by treaty? At first, the answer appears to be in the negative because non-state actors generally may not be parties to treaties. Nevertheless, Section 4 of Part III (Articles 34 to 38) of the Vienna Convention on the Law of Treaties (VCLT) expressly recognizes the possibility that a treaty may create rights and obligations for non-parties.¹⁷ Although Section 4 refers only to non-party states, as one esteemed commentator has observed,¹⁸ there is no reason why the section should not also apply to non-party non-state actors. Article 34 of the VCLT provides the general rule that “[a] treaty does not create either obligations or rights for a third State without its consent.”¹⁹ Article 35 then provides: “An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.”²⁰ Assuming that this latter provision is equally applied to non-state actors, there are two requirements for a non-state actor to acquire an obligation by treaty. First, “the parties to the treaty intend the provision to be the means of establishing the obligation”; and second, “the [non-state actor] expressly accepts that obligation in writing.”²¹

As for the first requirement, it is not difficult to imagine how the parties to a treaty can express their intent for the provision in question to establish the obligation. The clearest example is where the text of the treaty expressly states that the non-state actor “shall” do something. Although this sort of provision is not common, it does indeed exist in many international treaties. For example, Article 6(5) of Additional Protocol II provides: “At the end of hostilities, *the authorities in power shall endeavour* to grant the broadest possible amnesty to persons who have

17. See VCLT, *supra* note 14, arts. 34–38.

18. See Cassese, *supra* note 12, at 423.

19. VCLT, *supra* note 14, art. 34.

20. *Id.* art. 35.

21. *Id.*

participated in the armed conflict”²² Although the “authorities in power” at the end of hostilities may be a state, it may also be a non-state armed group. As another example, Article 21(4) of UNCLOS provides: “*Ships shall sail under the flag of one State only*”²³ One can also find examples in provisions governing the constitution of an arbitral tribunal. For example, the second paragraph of the Annex to the Convention on the Protection of the Rhine provides: “If the chair of the arbitral tribunal has not been appointed . . . , *the President of the International Court of Justice shall appoint an arbitrator*”²⁴

There are three ways to interpret these provisions. First, one can interpret them as only imposing an obligation on the state that has jurisdiction over the non-state actor to ensure that the non-state actor complies with the prescription. This interpretation, however, is unpersuasive given that the drafters could easily have rephrased the provision to make clear that the obligation was on the state, not the non-state actor. Second, one can interpret them as automatically placing an obligation on the non-state actor. Under the voluntarist paradigm outlined above, this interpretation is unpersuasive because, if non-state actors are to be considered as independent subjects under international law, states should not have the power to directly impose obligations under international law on them, even though states may impose obligations under domestic law on them. Third, one can interpret these provisions as merely expressing an intention by the states to bind a non-state actor, fulfilling the first requirement under Article 35 of the VCLT. This third approach is the most sensible.

As for the second requirement, if non-state actors are to be considered as independent subjects under international law, it makes sense to require them to expressly consent to any treaty obligation that binds them. If Article 35 requires that non-party states expressly accept treaty obligations in writing for the obligations to bind them,²⁵ then it makes sense for non-party, non-state actors to do the same. In conclusion, then, although non-state actors generally may not be parties to treaties, they may still acquire obligations by treaty.

22. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6, ¶ 5, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) (emphasis added).

23. UNCLOS, *supra* note 10, art. 92(1) (emphasis added); *see also id.* art. 21(4).

24. Convention on the Protection of the Rhine annex, ¶ 2, Apr. 12, 1999 (emphasis added); *see also* Arbitration Agreement Between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, Slovn.-Croat., art. 2, ¶ 1, Nov. 4, 2009 (“In case that [the Parties] cannot agree . . . the President and the two members of the Arbitral Tribunal shall be appointed by the President of the International Court of Justice from the list.”).

25. VCLT, *supra* note 14, art. 35.

Second, can non-state actors acquire obligations by custom? Once again, at first, the answer appears to be in the negative because custom, according to the ICJ, is “to be looked for primarily in the actual practice and *opinio juris of States*”²⁶—hence the notions of “state practice” and “*opinio juris*.” Nevertheless, one must recall that Article 38(1)(b) of the ICJ Statute does not mention “states” at all; rather, it defines “custom” as “evidence of a general practice accepted as law.”²⁷ By the terms of the Article 38(1)(b) alone, there is thus no reason why a non-state actor’s practice and *opinio juris* cannot create custom binding on non-state actors.

Third, can non-state actors acquire obligations by general principle of law? This question is difficult to answer given the lack of consensus over what constitutes a general principle of law. Nevertheless, as Alain Pellet notes, there is “little doubt” that general principles of law are “unwritten legal norms of a wide-ranging character,” “recognized in the municipal laws of States,” and “transposable at the international level.”²⁸ If general principles of law may impose obligations on states, there is thus no reason why they may not impose obligations on non-state actors.

Fourth, can non-state actors acquire obligations by unilateral act? As the ICJ held in the *Nuclear Tests* cases, “[i]t is well recognized that declarations made by way of unilateral acts . . . may have the effect of creating legal obligations.”²⁹ To the extent that a non-state actor makes a similar declaration that meets the requirements set forth in the *Nuclear Tests* cases, there is no reason why it should not be bound by such a declaration.

In conclusion, then, non-state actors may acquire obligations by treaty, custom, general principle of law, and unilateral act.

B. *Lex Specialis*

As mentioned above, courts, tribunals, and commentators generally agree that non-state actors can hold obligations under international law. The large majority of such courts, tribunals, and commentators do not

26. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 1985 I.C.J. Rep. 13, ¶ 27 (June 3) (emphasis added); see also *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 183 (June 27).

27. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 3 Bevans 1153, UKTS 67 (1946).

28. Alain Pellet, *Article 38*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 677, 766 (Andreas Zimmerman, et al. eds., 2012).

29. *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 I.C.J. Rep. 253, ¶ 43 (Dec. 20); *Nuclear Tests (N.Z. v. Fr.)*, Judgment, 1974 I.C.J. Rep. 457, ¶ 46 (Dec. 20).

propound a theory for how non-state actors acquire such obligations. Those that do tend to only propose such a theory in their particular area of international law. This Section examines these theories.

1. International Humanitarian Law

International humanitarian law (IHL) is perhaps the area of international law where scholars have discussed the question of how non-state actors acquire obligations the most. The question arises most frequently in the context of non-international armed conflicts (NIACs). Common Article 3 (CA3) and Additional Protocol II (APII) both apply in NIACs.³⁰ The issue, however, is that NIACs are generally conflicts between a state and a non-state actor. It would be unfair for IHL obligations to apply only to one side of an armed conflict. As a result, commentators generally agree that CA3 and APII apply not only to states engaged in NIACs, but also to non-state actors engaged in NIACs. States acquire obligations under CA3 and APII by ratifying or acceding to the respective treaties. The question, however, is how non-state actors acquire obligations under CA3 and APII.

Three major groups of theories have developed in this regard.³¹ The first and most popular group of theories holds that CA3 and APII apply to non-state actors through the state's ratification of or accession to the treaty because of the treaty's incorporation into domestic law, and/or the fact that the non-state actors are nationals of, on the territory of, and/or within the jurisdiction of the state. As Antonio Cassese notes, however, this group of theories arguably confuses international law and domestic law.³² It may explain how obligations become binding on the non-state actor under domestic law, but it does not explain how obligations under international law are imposed on the non-state actors.³³

The second group of theories holds that CA3 and APII apply to non-state actors through the non-state actors' consent to their application by virtue of unilateral acts or Article 35 of the VCLT (as applied to non-state

30. Article 19 of The Hague Convention on Cultural Property of 1954 also applies in NIACs, but commentary tends to focus on CA3 and APII. See Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 19, May 14, 1954, 249 U.N.T.S. 215.

31. For commentary attempting to enumerate the theories, see Andrew Clapham, *Non-State Actors*, in INTERNATIONAL HUMAN RIGHTS LAW 557, 557–79 (Daniel Moeckli, et al. eds., 3d ed. 2017); Clapham, *Human Rights Obligations*, *supra* note 11, at 498; Cassese, *supra* note 1212, at 420–30; Milanović, *supra* note 16, at 39.

32. See Cassese, *supra* note 12, at 429.

33. See *id.*

actors rather than states). Cassese has been an advocate of the latter.³⁴ The first requirement of Article 35—that “the parties to the treaty intend the provision to be the means of establishing the obligation”³⁵—is met by the fact that the parties to the Geneva Conventions and APII undoubtedly intended the treaties to apply to all sides of a NIAC, including non-state actors. The trickier part is the second requirement—the requirement that “the [non-state actor] expressly accepts that obligation in writing.”³⁶ Cassese recognizes that:

As for the second test, i.e. the assent by the third party to the rights or duties deriving from the treaty, it will of course be necessary to determine in each civil war whether rebels are ready and willing to accept the Protocol. This willingness may be shown in various ways; by a unilateral declaration addressed to the Government, by tacit compliance with the Protocol, by a request to the ICRC to intervene and guarantee respect for the Protocol, or by any other similar means.³⁷

Interestingly, he appears to take the view that the acceptance need not be express nor in writing, as he considers “tacit compliance with the Protocol” as a means of expressing acceptance of obligations thereunder.³⁸

The third group of theories is that CA3 and APII apply as customary or treaty law to non-state actors either because the customary or treaty rules apply to non-state actors generally, apply to non-state actors that reach a certain level of organization, apply to non-state actors that exercise state-like functions, and/or apply to non-state actors that claim to represent the state.

2. International Human Rights Law

International human rights law (IHRL) is another area where there is significant literature on how non-state actors acquire obligations under international law. It is now widely accepted that many human rights treaties confer rights on individuals. But there is a question as to whether non-state actors have the obligation under international law to respect such rights. In particular, a question that has often arisen in this context is

34. *See id.* at 420–30.

35. VCLT, *supra* note 14, art. 35.

36. *Id.*

37. Cassese, *supra* note 12, at 428.

38. *Id.*

whether corporations have international obligations to respect economic, social, and cultural rights (ESCRs).

The Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), appears to answer this question in the negative. The ICESCR confers rights on individuals, and the CESCR has recognized the importance of corporations in respecting these rights. Nevertheless, the CESCR has focused its attention on state obligations under the ICESCR, not corporate obligations.³⁹ Similarly, the International Labour Organization (ILO) has adopted many conventions that confer rights on individuals and aim to ensure that corporations respect labour rights. Nevertheless, as far as the present author is aware, the ILO conventions do not impose any direct obligations on corporations. Rather, they impose obligations on state parties to enact legislation and take other measures in order to influence the conduct of corporations and ultimately achieve the conventions' objectives.⁴⁰

If one is to argue that corporations have obligations to respect ESCRs, one would have to identify a particular theory under which they acquire such obligations. One could adopt—and scholars have adopted—any of the three groups of theories discussed above in the context of IHL for this question as it relates to IHRL. One could argue that corporations acquire such an obligation by virtue of the state's ratification of or accession to the ICESCR because of the treaty's incorporation into domestic law and/or the fact that the corporations are nationals of, on the territory of, and/or within the jurisdiction of the state. Or perhaps, corporations may expressly or impliedly consent to the obligation of respecting ESCRs or the obligation could also arise from customary law, whether it be a customary rule that applies to corporations generally, applies to corporations that reach a certain level of organization, and/or applies to corporations that exercise state-like functions. All of these theories could rationally be invoked.

An additional theory has also been proposed in this context. Steven Ratner has argued that, contrary to the text of the ILO conventions, “both the purpose of the conventions and their wording make clear that they do

39. See, e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017) [hereinafter General Comment No. 24]; Committee on Economic, Social and Cultural Rights, Statement on the Obligations of State Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2011/1 (July 12, 2011).

40. See, e.g., Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation arts. 2–3, June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960).

recognize duties on enterprises regarding their employees.”⁴¹ In particular, he argues that the affirmation of rights in the conventions imply corresponding obligations. As an example, he notes:

[O]ne of the ILO’s so-called core conventions, the 1949 Convention Concerning the Application of the Principles of the Right To Organise and To Bargain Collectively, states simply, “Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.” While clearly an injunction to governments to enact legislation against certain behavior by industry, the obligation also entails, indeed presupposes, a duty on the corporation not to interfere with the ability of employees to form unions.⁴²

The investor-state tribunal in the recent case of *Urbaser v. Argentina* took a similar approach. It effectively held that corporations acquire the obligation to respect ESCRs under the Universal Declaration of Human Rights (UDHR) because it is an implied “corresponding obligation” derivative from the mere existence of rights.⁴³ The tribunal stated:

It may be said that these and other provisions do not state more than rights pertaining to each individual. Nevertheless, in order to ensure that such rights be enjoyed by each person, it must necessarily also be ensured that no other individual or entity, public or private, may act in disregard of such rights, which then implies a corresponding obligation.⁴⁴

Nevertheless, neither Ratner nor the *Urbaser v. Argentina* tribunal explain how a corporation acquires such obligations in the framework of the sources of international law.

41. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 478 (2001).

42. *Id.* at 478–79. Ratner also argues that certain conventions impose direct obligations by virtue of their text. He cites to Article 16(1) of the Occupational Safety and Health Convention, which provides that “[e]mployers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.” *Id.* at 479 n.139. Nevertheless, he fails to note that the language “shall be required” does not impose a direct obligation on the employer, but rather on another entity (probably the State) that has the power to impose requirements on the employer. *See id.* at 478–79, 479 n.139.

43. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1196 (Dec. 8, 2016).

44. *Id.*

3. International Investment Law

Although IIAs generally impose obligations on states, some IIAs—particularly newer ones—also impose obligations on investors. A recent example is the Morocco-Nigeria Bilateral Investment Treaty, Article 14 of which provides in relevant part:

- (1) *Investors . . . shall* comply with environmental assessment screening
- (2) *Investors . . . shall* conduct a social impact assessment of the potential investment
- (3) *Investors . . . shall* apply the precautionary principle to their environmental impact assessment.⁴⁵

An older example is the Investment Agreement of the Organization of the Islamic Conference (OIC Agreement), Article 9 of which provides:

The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.⁴⁶

The question is, then, how the investor acquires obligations under such IIAs. On the one hand, one can argue that the obligations are automatically imposed on the investor because the investor is operating within the jurisdiction and/or on the territory of the states in question. On the other hand, one may ask how the investor can express its acceptance of the obligations imposed by the IIA. There are many options here. One can argue that the investor accepts the obligations, *inter alia*, by merely owning an investment in one of the contracting states (such that the obligations would apply in respect of all investments); by the act of investing in one of the contracting states (such that the obligations would only apply in respect of investments made after the entry into force of the IIA); or by the act of filing an investment claim against the host state (such that the obligations would only apply in respect of investments whose investors filed a claim with respect to the investments in question). The investor-state tribunal in

45. Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco-Nigeria, art 14., Dec. 3, 2016. *See also id.* art. 18(2)–(3) (stating that “[i]nvestors . . . shall uphold human rights in the host state [and] [i]nvestors . . . shall act in accordance with core labour standards as required”).

46. Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organization of the Islamic Conference, art. 9, June 5, 1981.

Al-Warraq v. Indonesia, in the context of examining the applicability of Article 9 of the OIC Agreement, adopted this last approach.⁴⁷

C. *Lex Generalis*

In light of this examination of international humanitarian law, international human rights law, and international investment law, there are four general theories for how non-state actors may acquire obligations under international law: (1) the non-state actor acquires an obligation because the non-state actor is a national of, on the territory of, or within the jurisdiction of a state that is bound by the obligation; (2) the non-state actor acquires an obligation because the non-state actor consented to the obligation; (3) the non-state actor acquires an obligation because customary law directly binds that non-state actor; and (4) the non-state actor acquires an obligation because the obligation corresponds to a right established in international law. The first three theories have been invoked in the context of international humanitarian law, all four in the context of international human rights law, and only the first two in international investment law.

	International Humanitarian Law	International Human Rights Law	International Investment Law
Theory 1 (Relationship with State)	X	X	X
Theory 2 (Consent)	X	X	X
Theory 3 (Custom)	X	X	
Theory 4 (Corresponding Obligation)		X	

If one adopts the voluntarist paradigm for non-state actors, then the first, third, and fourth theories could not hold water. The first theory is

47. Hesham Talaat M al-Warraq v. Republic of Indon., Final Award, ¶¶ 662–63 (Dec. 15, 2014).

weak because the mere fact that states can impose obligations on non-state actors in domestic law, does not mean they can also do so in international law. The third theory is weak because there has been very little study on the practice and *opinio juris* of non-state actors. And the fourth theory is weak because it relies on a purely abstract logic rather than one grounded in any of the sources of international law.

III. JURISDICTION OVER THE NON-STATE ACTOR

Another element that a successful claimant must establish is that the judicial body has jurisdiction over the matter. In general, there are four dimensions of jurisdiction: jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci*. The questions of jurisdiction *ratione materiae*, *ratione temporis*, and *ratione loci* are for the most part the same regardless of whether the respondent is a state or a non-state actor. The question with respect to jurisdiction *ratione personae*, however, raises some novel questions in cases where the respondent is a non-state actor.

A. Theory

The fundamental principle governing jurisdiction *ratione personae* is the principle of consent: in order for a judicial body to have jurisdiction over a subject, the subject must consent to the judicial body's jurisdiction.⁴⁸ States give such consent most often by treaty (e.g., dispute settlement clauses, special agreements, arbitration treaties). Nevertheless, states have also given such consent by unilateral act (e.g., Article 36(2) declarations, *forum prorogatum*⁴⁹). In addition, according to some, states may also give such consent by operation of a general principle of law: *estoppel*.⁵⁰

48. Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, ¶ 33 (July 23, 1923); Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K. & U.S.), Judgment, 1954 I.C.J. Rep. 19, 32 (June 15).

49. See Corfu Channel (U.K. v. Albania), Judgment, 1948 I.C.J. Rep. 15 (Mar. 25); Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. Rep. 177, ¶¶ 60–64 (June 4); Certain Criminal Proceedings in France (Congo v. Fr.), Provisional Measure Order, 2003 I.C.J. Rep. 102, ¶ 21 (June 17); Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), ITLOS Case No. 23, Judgment of Sept. 23, 2017, <https://www.itlos.org/en/cases/list-of-cases/case-no-23/#c3685>.

50. See "ARA Libertad" (Argentina v. Ghana), ITLOS Case No. 20, Order, ITLOS Rep. ¶ 52–73 (Dec. 15, 2012), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/published/C20_Order_151212.pdf. But see Achmea B.V. v. Slovak Republic, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 219 (Oct. 26, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf>; Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CALIF. L. REV. 1777, 1777 (1986).

Although non-state actors cannot conclude treaties, they can still consent to a judicial body's jurisdiction by internationalized agreements, Article 35 of the VCLT, as well as by unilateral act and, in theory, estoppel. Indeed, non-state actors have given such consent, most often by unilateral act, when acting as claimants. In such contexts, the question of jurisdiction *ratione personae* is a non-issue because it is assumed that the non-state actor consents to jurisdiction by the mere act of filing the claim. In cases where the non-state actor is a respondent, however, the issue is not as straightforward.

B. *Lex Specialis*

Currently, international judicial bodies have jurisdiction *ratione personae* over non-state actors acting as respondents in at least three areas of international law: international investment law,⁵¹ the law of the sea,⁵² and international criminal law.⁵³ This section examines how non-state actors consent to the jurisdiction of the judicial body in these three areas of law.

1. International Investment Law

In all known investor-state arbitrations to date, the investor has always been the party initiating the arbitration. As a result, the issue of jurisdiction over non-state actors as respondents arises only where the state files counterclaims. Both the International Centre for Settlement of Investment Disputes (ICSID) Convention and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules allow for counterclaims, but the counterclaims must be within the jurisdiction *ratione materiae* and jurisdiction *ratione personae* of the arbitral tribunal.⁵⁴

Many IIAs do not allow for counterclaims because they grant investor-state tribunals jurisdiction *ratione materiae* only over disputes concerning

51. See, e.g., *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims (Feb. 7, 2017); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).

52. See UNCLOS, *supra* note 10, art. 187(c)–(e).

53. See, e.g., Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

54. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 46, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; G.A. Res. 31/98, Arbitration Rules of the United Nations Commission on International Trade Law (Dec. 15, 1976).

the host state's allegedly wrongful conduct. For example, Article 9 of the Greece-Romania bilateral investment treaty (BIT) grants jurisdiction *ratione materiae* only over "[d]isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement".⁵⁵ On the other hand, the language of other IIAs is broader. In *Urbaser v. Argentina*, the provision at stake was Article X(1) of the Argentina-Spain BIT, which grants jurisdiction *ratione materiae* over "disputes . . . in connection with the investments."⁵⁶ In such cases where a tribunal has jurisdiction *ratione materiae* over the counterclaim, it must then proceed to examine whether it has jurisdiction *ratione personae* over the investor as a respondent. Investor-state tribunals have declared that they have jurisdiction *ratione personae* over investors as respondents on the basis of two grounds.

First, in some cases, the investor and the state expressly conclude an agreement granting the tribunal jurisdiction over the counterclaim. For example, in *MINE v. Guinea*⁵⁷ and *Atlantic Triton v. Guinea*,⁵⁸ such consent was given in the concession agreements in question, and in *Burlington v. Ecuador*, it was given in a separate agreement.⁵⁹

Second, in other cases, the investor does not expressly grant the tribunal jurisdiction over counterclaims. Here, a question arises as to whether the claimant's submission of the principal claim to arbitration qualifies as consent to counterclaims that may be filed against it. In the recent cases of *Goetz v. Burundi (II)*,⁶⁰ *Al-Warraq v. Indonesia*,⁶¹ and *Urbaser v. Argentina*,⁶² the tribunal answered this question in the affirmative.

55. The treaty is not publicly available, but this provision was quoted in Spyridon Roussalis v. Romania, ICSID Case No ARB/06/1, Award, ¶ 868 (Dec. 7, 2011). In that case, Romania filed a counterclaim, but the tribunal held that it did not have jurisdiction over it. *Id.* ¶ 869.

56. Argentina-Spain BIT, *supra* note 9, art. 10(1).

57. Maritime Int'l Nominees Establishment (MINE) v. Republic of Guinea, ICSID Case No. ARB/84/4, Award, (Jan. 6, 1988), 4 ICSID Rep. 61 (1997).

58. Atlantic Triton Co. Ltd. v. People's Revolutionary Republic of Guinea, ICSID Case No. ARB/84/1, Award, (Apr. 21, 1986), 3 ICSID Rep. 13 (1995).

59. See, e.g., Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, ¶ 60 (Feb. 7, 2017).

60. Antoine Goetz & Consorts & Others and S.A. Affinage des Metaux v. Republic of Burundi, ICSID Case No. ARB/01/2, Award, ¶ 278 (June 21, 2012).

61. See Hesham Talaat M al-Warraq v. Republic of Indon., Final Award, ¶¶ 662–64 (Dec. 15, 2014).

62. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 1147 (Dec. 8, 2016).

2. Law of the Sea

Article 187(c) of UNCLOS grants the ITLOS Seabed Disputes Chamber jurisdiction *ratione materiae* over disputes with contractors operating in the deep seabed.⁶³ Since contractors cannot be party to UNCLOS, the question is how the Chamber may acquire jurisdiction *ratione personae* over contractors.

The answer is contracts. Any contractor engaging in exploration or exploitation of the deep seabed must have a contract in force with the International Seabed Authority (ISA), the intergovernmental authority that organizes and controls activities in the deep seabed.⁶⁴ The ISA has developed standard terms for exploration contracts, which read: “Any dispute between the parties concerning the interpretation or application of this contract shall be settled in accordance with Part XI, section 5, of the Convention.”⁶⁵ The current draft standard terms for exploitation contracts is substantially the same.⁶⁶

3. International Criminal Law

In international criminal law (ICL), unlike in international investment law and the law of the sea, it is very difficult to argue that the non-state actor in question—the individual on trial—consented, even impliedly, to the jurisdiction of the judicial body. One thus should question how international criminal courts and tribunals acquire jurisdiction *ratione personae* over individuals.

Interestingly enough, scholars tend to sidestep this question.⁶⁷ The few that have addressed it rely on a single theory: states delegate their punitive power to international criminal courts and tribunals by way of

63. UNCLOS, *supra* note 10, art. 187(c) (emphasis added).

64. *Id.* art. 157(1).

65. Decision of the Council of the International Seabed Authority Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters at Its Nineteenth Session, ISA Doc. ISBA/19/C/17, at annex IV, sec. 25.1 (July 22, 2013); Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area at Its Eighteenth Session, ISA Doc. ISBA/18/A/11, at annex IV, sec. 25.1 (Oct. 22, 2012); Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area at Its Sixteenth Session, ISA Doc. ISBA/16/A/12/Rev.1, at annex 4, sec. 25.1 (Nov. 15, 2010).

66. INT’L SEABED AUTH., DEVELOPING A REGULATORY FRAMEWORK FOR MINERAL EXPLOITATION IN THE AREA 76, annex VI, Sec. 43 (2016).

67. See, e.g., Micaela Frulli, *Jurisdiction Ratione Personae*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 527, 532–33 (Antonio Cassese et al. eds., 2002).

treaty (e.g., International Criminal Court), U.N. Security Council resolution (e.g., International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda), or occupying authority (e.g., Nuremberg, Tokyo, Iraq).⁶⁸ As the International Military Tribunal held:

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right [thus] to set up special courts to administer law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.⁶⁹

C. *Lex Generalis*

In light of this examination of international investment law, law of the sea, and international criminal law, there are three general theories for how non-state actors may consent to the jurisdiction of an international judicial body: (1) the non-state actor concludes an agreement with the state; (2) the non-state actor consents to jurisdiction by unilateral act; and (3) the state delegates power it has under domestic law to the judicial body acting under international law. The first two theories have been invoked in the context of international investment law, the first theory in the context of the law of the sea, and only the last theory in international criminal law.

	International Investment Law	Law of the Sea	International Criminal Law
Agreement	X	X	
Unilateral Act	X		
Delegated Power			X

68. See, e.g., 1 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW 57 (2013); Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 985 (2006).

69. Trial of the Major War Crimes Before the International Military Tribunal, Judgment (Oct. 1, 1946), reprinted in 41 AM. J. INT'L L. 172, 216–17 (1947).

If one adopts the voluntarist paradigm for non-state actors, then the last theory would not be valid. The first two theories, however, would be perfectly acceptable given that they are based on the consent of the non-state actor. Nevertheless, it would be unlikely for any individual subject to an international criminal proceeding to consent to the proceedings against him or her. One may thus consider international criminal law to be an exception—a justifiable *lex specialis*. After all, in domestic law, criminal cases similarly do not require the consent of the parties. It would thus be unrealistic to impose a consent requirement in international criminal law.

IV. CONCLUSION

This Article examined two elements that must be established to make a successful claim against a non-state actor: (1) how non-state actors acquire obligations under international law; and (2) how international judicial bodies acquire jurisdiction *ratione personae* over non-state actors. Interestingly, the five different areas of law examined deal with these two elements differently, and associated commentators have propounded varying theories with regards to the two elements. Thus, there appears to be greater divergence than convergence.

This raises the question of whether a *lex generalis* is appropriate for non-state actors acting as respondents. Perhaps, unlike the regimes for states and international organizations, the regime for non-state actors should exist only as *lex specialis* in particular areas of law. This way, one can better explain why there are divergences with regards to the two aforementioned elements in the examined areas of law. On the other hand, one can argue that this divergence is problematic because the fundamental principles of international adjudication should be the same across the board. As a result, a divergence between two areas of law actually means that at least one area of law is not treating non-state actors as they should be treated.

Regardless of which perspective one takes, the ultimate conclusion of this Article is that non-state actors acting as respondents before international judicial bodies must be taken seriously as subjects of international law. Taking them seriously means that they should, for the most part, have the same protections that states have: (1) non-state actors should not be subject to obligations under international law unless one can point to a concrete source of international law that imposes such an obligation on them; and (2) international judicial bodies should not have jurisdiction *ratione personae* over non-state actors without their consent. Only by respecting these principles, though perhaps with a few exceptions, can one hope to develop a legitimate system for non-state actors acting as respondents before international judicial bodies.